Supreme Court, U.S.
FILED
MAY 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal From the Supreme Court of Mississippi

BRIEF OF AETNA LIFE INSURANCE COMPANY, GOLDEN RULE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, THE OHIO CASUALTY INSURANCE COMPANY, TRANSAMERICA INSURANCE COMPANY, AND FIREMAN'S FUND INSURANCE COMPANY AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

Of Counsel:

DARRELL S. RICHEY
VICE PRESIDENT AND GENERAL COUNSEL
GOLDEN RULE INSURANCE COMPANY
712 11th Street
Lawrenceville, Ill. 62439

THOMAS J. NORMAN
ALLSTATE INSURANCE COMPANY
4 Allstate Plaza
Northbrook, Illinois 60062

COLIN MCRAE
SENIOR VICE PRESIDENT AND GENERAL COUNSEL
TRANSAMERICA INSURANCE COMPANY
1150 South Olive Street
Los Angeles, California 90015

*GEORGE C. MONTGOMERY
MONTGOMERY, GASCOU, GEMMILL & THORTON
1100 Glendon Avenue, Suite 1800
Los Angeles, California 90024
(213) 879-9115

**Counsel of Record for* Amici Curiae

Of Counsel:

N. DOUGLAS MARTIN, JR.
ASSISTANT VICE PRESIDENT & COUNSEL
FIREMAN'S FUND INSURANCE COMPANY
777 San Marin Drive
Novato, California 94998

QUESTION PRESENTED

Whether the Excessive Fines Clause of the Eighth Amendment, as made applicable to the States through the Due Process Clause of the Fourteenth Amendment, applies to control the size of punitive damage awards rendered in civil actions.

TABLE OF CONTENTS

	Page
INTEREST OF AMICI	1
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. INTRODUCTION	7
II. THE EXCESSIVE FINES CLAUSE AND ITS ENGLISH ANTECEDENTS WERE INTENDED TO CONTROL THE SIZE OF MONETARY AWARDS IMPOSED FOR THE PURPOSES OF PUNISHMENT AND DETERRENCE	8
A. *The History of Monetary Punishments Prior to Magna Carta*	9
B. *Magna Carta's Response to the Problem of Excessive Monetary Punishments*	12
C. *The Early Impact of Magna Carta on Excessive Monetary Punishments*	14
D. *Magna Carta in England in the 16th-18th Centuries*	17
E. *The Influence of Magna Carta in the Colonies*	20
F. *The Treatment of Excessive Monetary Punishments in Revolutionary Declarations and Constitutions*	24
G. *George Mason's Objections to the Federal Constitution*	25
CONCLUSION	27

TABLE OF AUTHORITIES

CASES: Page

United States Courts:

Aetna Life Insurance Co. v. Lavoie, No. 84-1601 (Apr. 22, 1986), 106 S. Ct. 1580 (1986) 2,3

Aetna Life Insurance Co. v. Lavoie, 505 So.2d 1050 (Ala. 1987) 2

Carlson v. Landon, 342 U.S. 524 (1952) 5

Downey Savings and Loan Association v. *The Ohio Casualty Insurance Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (Ct. App. 2d Dist.), *pet. for rev. denied*, No. S 000553 (Cal. May 27, 1987) 3

Fellows v. Allstate Insurance Co., No. C 259 993 (Cal. Ct. App. 2d Dist. Dec. 31, 1986), *pet. for rev. granted*, No. S 000007 (Cal. Apr. 2, 1987) 3

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 9

Hawkins v. Allstate Insurance Co., 733 P.2d 1073 (Ariz. 1987) 3

Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) 9

Solem v. Helm, 463 U.S. 277 (1983) 4,5,7,25

Trop v. Dulles, 356 U.S. 86 (1958) 5

English Courts:

Earl of Devon's Case, 11 State Tr. 1354 (1689) 19

Grey v. Grant, 2 Wils. K.B. 252, 95 Eng. Rep. 794 (C.P. 1764) 10

Griesley's Case, 8 Co. Rep. 38a, 77 Eng. Rep. 530 (C.P. 1588) 20

Table of Authorities Continued

Page

Knyght v. Gunter, (Star Chamber 1534), *reprinted in* 25 Selden Society 210 (1910) 12

LeGras v. Bailiff of Bishop of Winchester, Y.B. Mich. 10 Edw. II, pl. 4 (C.P. 1316), *reprinted in* 52 Selden Society 3 (1934) .. 15,16

55 Selden Society 2 (cas. no.2); 45 (cas. no.34); 90 (cas. no.65); 57 Selden Society 9 (cas. no.5); 25 (cas. no.14); 52 Selden Society 3; 58 (cas. no.31); 67 (cas. no.33); 89; 58 Selden Society 19 (cas. no.8); 21 (cas. no.9); 72 (cas. no. 42); 90 (cas. no.54); 114 (cas. no.65); 147 (cas. no.79); 211 (cas. no.106) 15

FEDERAL CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. V 24

U.S. Const. amend. VIII ..... *passim*

STATE STATUTES AND DOCUMENTS:

Delaware Declaration of Rights of 1776 24

Maryland Declaration of Rights of 1776 24

Massachusetts Body of Liberties of 1641 21

Massachusetts "Parallels" 21,22

New York Charter of Libertyes and Priviledges of 1683 23

North Carolina Declaration of Rights of 1776 24

Pennsylvania Declaration of Rights of 1776 ... 25

Pennsylvania Frame of Government of 1682 22,24-25

Virginia Declaration of Rights of 1776 24,25,26

Table of Authorities Continued

Page

ENGLISH STATUTES AND DOCUMENTS:

Articles of the Barons 12

4 Edw. III, Ch. I 15

English Bill of Rights of 1689, 1 Wm. & Mary, Sess. 2, Ch. 2 (1689) ..... *passim*

Magna Carta, 25 Edw. I, Ch. I, 1 Stat. at Large 131-32 (1297) ..... *passim*

MISCELLANEOUS:

The Laws and Liberties of Massachusetts (T. Barnes ed. 1982) 21

3 W. Blackstone, *Commentaries on the Law of England* (1768) 20

4 W. Blackstone, *Commentaries on the Laws of England* (1768) 5

W. Blackstone, *The Great Charter and the Charter of the Forest* (1759) 13

1 *Borough Customs* (M. Bateson ed.), in 18 Selden Society (1904) 18

E. Coke, *The Second Part of the Institutes of the Laws of England* (5th ed. 1797) 17

W. Dunham, "Magna Carta and British Constitutionalism" in *The Great Charter* (1965) 15

A. Fitzherbert, *Natura Brevium* (6th ed. 1718) . 14,17

G. Haskins, *Law and Authority in Early Massachusetts* (1960) 21

H. Hazeltine, "The Influence of Magna Carta on American Constitutional Development" in *Magna Carta Commemoration Essays* (H. Malden ed. 1917) 20,24

J. Holt, *Magna Carta* (1965) 11

A. Howard, *The Road from Runnymede* (1968) .... *passim*

J. Jolliffe, *The Constitutional History of Medieval England* (3d ed. 1954) 10

Table of Authorities Continued

Page

P. Kurland, "Magna Carta & Constitutionalism in the United States: The Noble Lie," in *The Great Charter* (1965) 7

W. McKechnie, *Magna Carta* (2d ed. 1958) ..... *passim*

F. Maitland, *Pleas of the Crown for the County of Gloucester* (1884) 15

S. Milsom, *Legal Introduction to Nova Narrationes*, in 80 Seldon Society (E. Shanks ed. 1963) . 16

2 F. Pollock & F. Maitland, *The History of English Law* (2d ed. 1909) 11,18

1 B. Schwartz, *The Bill of Rights: A Documentary History* (1971) ..... *passim*

G. Smith, *A Constitutional and Legal History of England* (1955) 19

R. Stringham, *Magna Carta: Fountainhead of Freedom* (1966) 11

F. Thompson, *Magna Carta: Its Role in the Making of the English Constitution 1300-1629* (1948) ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1765

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal From the Supreme Court of Mississippi

BRIEF OF AETNA LIFE INSURANCE COMPANY, GOLDEN RULE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, THE OHIO CASUALTY INSURANCE COMPANY, TRANSAMERICA INSURANCE COMPANY, AND FIREMAN'S FUND INSURANCE COMPANY AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

INTEREST OF AMICI*

This case concerns the question whether the Constitution, specifically the Excessive Fines Clause of the Eighth Amendment, is to be applied as a restraint on the size of

---

*Pursuant to Rule 36 of the Rules of the Court, letters from counsel of record for each of the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

punitive damage awards which have been made by juries more frequently and in increasingly larger sums over the past decade. In imposing large and completely unpredictable punitive damage awards such as the extravagant award in this case, civil juries function with unfettered discretion to decide whether an insurance company should be punished and to what extent. In authorizing civil juries to perform this role, the states are implementing a system of punitive justice on an *ad hoc* basis, establishing through jury verdicts substantive standards of conduct and levels of punishment which have never been subjected to legislative consideration. The result of this random process is a penal justice system which functions without clear prospective standards. Indeed, the only certainty in this system is that a confiscatory punitive award may be imposed for virtually any mistake made in the processing of an insurance claim.

Amicus Aetna Life Insurance Company first presented to this Court the argument that the Excessive Fines Clause ought to be applied to control the size of punitive damage awards in *Aetna Life Insurance Co. v. Lavoie*, No. 84-1601 (Apr. 22, 1986), 106 S. Ct. 1580 (1986). In that case, a narrow majority of the Supreme Court of Alabama had affirmed a judgment of $3.5 million in punitive damages against Aetna for alleged bad faith in the refusal to pay $1,650.22 of a health insurance claim.[1] In *Lavoie*, amicus Golden Rule Insurance Company appeared as amicus in this Court, pointing out that the award against Aetna would have constituted fourteen percent of Golden Rule's entire benefits payments for a recent year. Golden Rule argued to the Court that the lack of meaningful substan-

---

[1] On remand from this Court's decision vacating that judgment, the Supreme Court of Alabama ordered the award reduced to $500,000; in so ordering, only a three-justice plurality approved the award of punitive damages. *See Aetna Life Ins. Co. v. Lavoie*, 505 So.2d 1050 (Ala. 1987).

tive rules of conduct, which results in the imposition of new rules retroactively on insurance companies as each punitive damage award is entered, makes it virtually impossible for a small insurance company to be sure that it can survive.

Amicus Allstate Insurance Company is experiencing first hand the results of uninhibited jury punitive damage verdicts. It is before the California Supreme Court in connection with a $40 million jury verdict in an insurance bad faith case. In addition, on February 26, 1987 the Supreme Court of Arizona reinstated a $3.5 million punitive damage award against Allstate in a bad faith case notwithstanding arguments by Allstate based on this Court's statement in *Aetna Life Insurance Co. v. Lavoie*, slip op. at 13, 106 S. Ct. at 1589, that the applicability of the Excessive Fines and Due Process Clauses to such awards raised "important" questions.[2]

Amicus The Ohio Casualty Insurance Company recently experienced the affirmance of a $5 million punitive damage award in a bad faith case by a California intermediate appellate court. *Downey Savings and Loan Association v. The Ohio Casualty Insurance Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (Ct. App. 2d. Dist.), *pet. for rev. denied*, No. S 000553 (Cal. May 27, 1987).

Amici Transamerica Insurance Company and Fireman's Fund Insurance Company are each similarly defendants in cases in which large punitive damages have been sought.

Amici collectively conduct their insurance businesses in all fifty States. Each day they process thousands of insurance claims, and in most jurisdictions each claim processed could result in arbitrary and excessive punishment because of a jury's determination, made at trial years after

---

[2] *Fellows v. Allstate Insurance Co.*, No. C 259 993 (Cal. Ct. App. 2d Dist. Dec. 31, 1986), *pet. for rev. granted*, No. S 000007 (Cal. Apr. 2, 1987); *Hawkins v. Allstate Insurance Co.*, 733 P.2d 1073 (Ariz. 1987).

the events underlying a lawsuit occurred, that a claim should have been paid. The massive reallocation of society's resources which occurs with each jury's verdict, or with increasingly larger settlements because of the prospect of unlimited punitive damages, raises social and economic issues of signal importance which have, for the most part, not been addressed directly by the bodies capable of doing so—the legislatures of the several States.

Absent the constitutional protection from excessive punitive awards provided by the Excessive Fines Clause, amici are being deprived of rights which have been accorded in England since Magna Carta. If, as the Court stated recently in *Solem v. Helm*, 463 U.S. 277, 285-86 n.10 (1983), the Eighth Amendment provides at least the same "liberties and privileges" available under the lineal antecedents of the Eighth Amendment—including the amercements clauses of Magna Carta—then Bankers Life and amici are also entitled to those liberties and privileges, one of which was freedom from arbitrary and excessive fines.

STATEMENT OF THE CASE

Amici adopt appellant Bankers Life's statement of the case. Only two additional points should be emphasized.

First, the $1,600,000 penalty imposed by the jury in the case below is part of a governmental system of punishments inflicted on an *ad hoc* basis at the instance of private litigants for deviations from vague, judicially pronounced, generalized standards of conduct. This case is not about the liability of a private party for injuries caused by its conduct. It is about governmental punishments. However aberrational in practice, punitive damages/civil fines are part of a government program to affect behavior through selective punishments.

Second, the punitive damage/civil fine system in Mississippi is characterized by the same qualities listed by Black-

stone as the very definition of injustice and inhumanity: disproportionality, uncertainty and arbitrariness. Not unlike the system of corporal punishments eventually abolished in England, punitive damages/civil fines are "[p]unishments of unusual severity, especially when indiscriminately inflicted . . . ." 4 W. Blackstone, *Commentaries on the Laws of England* *16-17 (1768).

SUMMARY OF ARGUMENT

Since the Excessive Fines Clause of the Eighth Amendment was ratified on December 15, 1791, this Court has never had occasion to consider and apply that Clause to an "excessive fine." Thus, this Court has never determined what the Framers of the Bill of Rights intended by the word "fine" or what would constitute an "excessive" fine. This Court's decisions have, however, established two principles which are deeply implicated in this case. The first principle is that clauses of the Eighth Amendment often associated with punishments imposed at the conclusion of criminal proceedings—the Excessive Bail and Cruel and Unusual Punishments Clauses—are applicable to detention or punishment imposed outside of the formal criminal process. *Carlson v. Landon*, 342 U.S. 524 (1952) (bail)); *Trop v. Dulles*, 356 U.S. 86 (1958) (punishment). The second principle is that the Eighth Amendment embodies the concept that punishments must not be disproportionate to the offence, a principle which this Court, in *Solem v. Helm*, *supra*, derived from the amercements clauses of Magna Carta.

In this case, the $1.6 million punitive award at issue was imposed for the sole purpose of punishing Bankers Life rather than compensating appellee. As articulated by the court below, the jury was authorized to impose an award in any size it deemed adequate to exact society's retribution for the conduct allegedly engaged in by Bankers Life and to deter Bankers Life and other similarly situated persons, including amici, from engaging in similar

conduct. Thus, the purposes of this award are to fulfill the historical purposes of the criminal law—punishment and deterrence. *Trop v. Dulles*, 356 U.S. at 96 (Warren, C.J.) (plurality opinion).

Because they are intended to punish and deter, punitive damages are functionally and legally indistinguishable from monetary awards imposed in like circumstances under English common law for more than nine centuries. Monetary awards designed to punish and deter a wrong-doer were known as "wites" in pre-Norman days, "amercements" for about six centuries after the Norman Conquest, and "fines" thereafter. However denominated, these monetary impositions over the centuries came to be controlled in England by legal principles pursuant to which limits on such monetary exactions were ascertained and enforced. Foremost among the documents establishing this system of restraints on the exercise of arbitrary power to inflict monetary punishment were Magna Carta, the amercements clauses of which provided that punitive awards must be proportionate to the offence and imposed only by the early equivalent of a jury, and the English Bill of Rights of 1689, which incorporated Magna Carta's principle of proportionality and from which the language of the Eighth Amendment was lifted virtually verbatim.

In theory and in practice, these restraints on the exercise of power to punish persons for conduct declared to constitute civil wrongs under English common law were implemented in two stages. First, the maximum punitive award was determined according to the equivalent of a statute or by the judge of the court involved based upon the nature of the offence. Then, a group of peers of the wrong-doer determined whether the wrong-doer, based upon his financial circumstances, should pay all, part or none of that fine. What evolved over the centuries was a relatively fixed system of maximum fines which replaced the arbitrary, uncontrolled system that largely existed prior to Magna Carta. The legal systems of Mississippi and many

other States have reinstituted the arbitrary and capricious practices of the period before Magna Carta.

This system of restraints on arbitrary punitive awards was, as observed by this Court in 1983, not a "hollow guarantee[ ]." *Solem v. Helm*, 463 U.S. at 285. The English courts, in reliance on Magna Carta as reconfirmed by successor Kings, as declared to be part of English Common law by the Parliament in 1297, and as enacted into statutory law on numerous occasions by later parliaments, struck down amercements and fines as being excessive. This same principle prohibiting excessive governmental financial penalties was brought to the colonies in the 17th Century, where it was incorporated directly into governing documents, including those of Massachusetts, Pennsylvania and New York, in language taken directly from Magna Carta and, after 1689, in virtually all of the colonies in language lifted directly from either Magna Carta or the English Bill of Rights of 1689.

The rest is familiar territory to the Court. When the Framers of the Bill of Rights in the First Congress considered and proposed the language which is now the Eighth Amendment, they brought to that process a tradition pursuant to which fines and financial penalties, as well as other punishments, had to be proportional. In the Eighth Amendment, they "intended to provide at least the same protection—including the right to be free from excessive punishments," *Solem v. Helm*, 463 U.S. at 286, that their English forebears had enjoyed.

ARGUMENT

I. INTRODUCTION

The Federal Constitution enshrines a "number of fundamental principles derived—immediately or ultimately—from Magna Carta . . . ."[3] This case presents two related

---

[3] P. Kurland, "Magna Carta and Constitutionalism in the United States: "The Noble Lie," in *The Great Charter* 57 (1965).

questions concerning one of those principles. The first is whether the Excessive Fines Clause of the Eighth Amendment, derived from Magna Carta's restraints on excessive amercements, is to be applied to control the size of punitive damage awards rendered by state judicial systems in civil cases. The second question is how the principle of proportionality carried from Magna Carta into the Excessive Fines Clause is to be applied to control the size of punitive damages awards, such as the $1.6 million award in this case, which are constitutionally "excessive." As amici will demonstrate, both of these questions may be answered by reference to the history of Magna Carta's adoption of the principle outlawing excessive amercements, the implementation of that principle in the courts and statutes of England, and ultimately the incorporation of that principle in the Excessive Fines Clause of the Eighth Amendment.

II. THE EXCESSIVE FINES CLAUSE AND ITS ENGLISH ANTECEDENTS WERE INTENDED TO CONTROL THE SIZE OF MONETARY AWARDS IMPOSED FOR THE PURPOSES OF PUNISHMENT AND DETERRENCE

The governmental purposes of the punitive damage award in this case and of such awards generally is common ground: to punish the wrong-doer and to deter others who may engage in the same conduct. In the context of the tort of bad faith failure to pay an insurance claim in Mississippi (and in other jurisdictions recognizing this tort), the punitive damage component of the total judgment is fundamentally different from the actual contract damages component because the punitive damage component does not, in theory or actuality, compensate the plaintiff for losses suffered by reason of a breach of the insurance contract. Rather, a punitive damage award is made for the purpose of responding to the injury to the public which

assertedly occurs in the course of the commission of an offence, here the offence of an insurer against its insured.

As stated by the court below, its "law" of bad faith

> authorize[s] a quantum of punitive damages [in] that amount reasonably necessary to punish [Bankers Life] and to provide a substantial deterrent to it and others similarly situated from the commission of similar offenses, all consistent with the pecuniary ability and financial worth of the defendant.

J.S. App. 50a, 483 So.2d 254, 278 (1985).

Punitive damages have been correctly characterized as "serv[ing] the same function as criminal penalties and [being] in effect private fines." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (punitive damages "are private fines levied by civil juries").

Monetary fines imposed to vindicate the public's interest in a public wrong committed by one private person against another have a long and abiding place in the English legal system, which was inherited and understood by the Framers of the Constitution and the Bill of Rights. The Framers also, as amici will demonstrate, understood the restraints which had been placed by Magna Carta and subsequent English statutes, including the English Bill of Rights of 1689, on monetary awards designed to punish and deter, and they incorporated those restraints into the Eighth Amendment.

A. *The History of Monetary Punishments Prior to Magna Carta*

Prior to the Norman Conquest in 1066, a practice existed in England under which the victim of a wrong, rather than seeking vengeance through retaliation or "blood-feud," could instead secure financial compensation from

the perpetrator of the offence. Gradually, this system became mandatory, limiting the right to seek personal revenge to situations in which the injured person had sought and been refused compensation from the wrong-doer.[4] Such compensatory sums, known as "wers" or "bots," were imposed as compensation due to the victim. At the same time, however, a further payment, known as a "wite," would be exacted from the wrong-doer as a sum "due to the community, on the ground that every evil deed inflicts a wrong on society in general, as well as upon its victim."[5] This theory remains, centuries later, as the bedrock of punitive damage theory under which the award against Bankers Life was imposed.

This relatively fixed and certain system of settling grievances under Anglo-Saxon law was, at some point after the Norman Conquest, succeeded "by a system, or lack of a system, by which the convicted party was 'in the king's mercy'. . . ."[6] Under this system, the wrong-doer's life, limbs and possessions were put at the King's mercy; the peace was thereafter restored by payment of a sum to compensate the victim for his losses—contemporary actual damages, and payment to the Crown of a sum known as an amercement[7]—today's punitive damages.

Because in theory a wrong-doer was "at the mercy" of the King, there was no limit on the amount he could be

---

[4] *See* W. McKechnie, *Magna Carta* 284-85 (2d ed. 1958). The objective of discouraging persons from seeking revenge was reiterated seven centuries later in one of the first English cases recognizing a right of recovery of "exemplary" damages in purely private litigation. *See Grey v. Grant*, 2 Wils. K.B. 252, 95 Eng. Rep. 794 (C.P. 1764).

[5] W. McKechnie, note 4 *supra*, at 285. According to McKechnie, the size of wers and wites was often determined by various codes. *Id.*

[6] J. Jolliffe, *The Constitutional History of Medieval England* 225 (3d ed. 1954).

[7] W. McKechnie, note 4 *supra*, at 286. This payment to the Crown was based on the theory "that offences against the established order were offences also against the King . . . ." *Id.* at 80.

amerced. However, rules were formulated under which the amounts initially amerced were regulated by the gravity of the particular offence involved and the ability of the wrong-doer to pay. The purpose of these rules was to prevent arbitrary and excessively large amercements, a need made urgent because "most men in England must have expected to be amerced at least once a year."[8]

Consistent with the theory that amercements were designed to remedy the wrong done to the public rather than to compensate the wrong-doer, amercements would generally be assessed in a two-stage process. In the first stage, the maximum possible amercement would be determined by the justices of the court, who had the "duty to see that the amount was proportionate to the gravity of the offence."[9] Indeed, the history of amercements during the 11th Century records some instances in which the function of setting such a cap on amercements in individual cases was taken away from the justices, with the maximum amounts being set by the equivalent of statutes.[10]

The second-stage process of determining the actual amount of the amercement to be imposed in a particular case involved twelve (or fewer) neighbors who "affeered" or taxed the amercements, "reducing them in accordance with their knowledge of the wrong-doer's ability to pay."[11] Thus, while "[w]ealth was one of the accepted bases for fixing a fine . . . ,"[12] it is more accurate to say that the *lack* of wealth functioned in this second stage of the amercement process to allow for the reduction of the potential amercement which had been set based upon the

---

[8] 2 F. Pollock & F. Maitland, *The History of English Law* 513 (2d ed. 1909).

[9] W. McKechnie, note 4 *supra*, at 288.

[10] *See* J. Holt, *Magna Carta* 50, 230-31 (1965).

[11] W. McKechnie, note 4 *supra*, at 288.

[12] R. Stringham, *Magna Carta: Fountainhead of Freedom* 13 (1966).

gravity of the offence and *not* upon the identity, status or wealth of the perpetrator.[13]

Although the Norman system worked reasonably well through the reign of Henry II, the reigns of his successors, Richard I and John, led, *inter alia*, to the increasingly frequent imposition of larger and larger amercements. Under John, "[t]he whole administration of justice [was] degraded into [an] instrument[ ] of extortion."[14] This extortion was practiced at all levels of the court system, affecting freemen, barons and clergy.

B. *Magna Carta's Response to the Problem of Excessive Monetary Punishments*

Although the events leading up to the drafting of Magna Carta and its presentment to King John are complex, the unbridled imposition of excessive amercements was a point of major concern to the barons who presented John with their draft of Magna Carta at Runnymede on June 15, 1215. Three chapters of Magna Carta as accepted by John on that date were devoted to the problem of excessive amercements.[15] Chapter 20 provided as follows:

---

[13] As explained and reinforced in the 16th Century case of *Knyght v. Gunter* (1534), decided in the Court of Star Chamber, "[t]he amercement was the act of the Court [and was] reduced to a certainty, by the oath of a jury.... [The] jurors [were] sworn to affeere, that is, tax and moderate the general amercement according to the particular circumstance of the offence and the offender." 25 Selden Society 210, 213 n.30 (1910).

[14] W. McKechnie, note 4 *supra*, at 22.

[15] The problem of excessive amercements had been addressed in Chapter 37 of the Articles of the Barons, a document which in many respects formed the basis for Magna Carta itself. That document, prepared earlier in 1215 by the barons, dealt expressly with excessive amercements, differing from Magna Carta's three chapters on that subject largely by its lack of adequate protection for barons and clergy. *See* W. McKechnie, note 4 *supra*, at 37, 490.

> A freeman shall not be amerced for a slight offence, except in accordance with the degree of the offence; and for a grave offence he shall be amerced in accordance with the gravity of the offence, yet saving always his "contenement"; and a merchant in the same way, saving his "merchandise"; and a villein shall be amerced in the same way, saving his "wainage"—if they have fallen into our mercy: and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighbourhood.

Chapter 21 applied these same general principles to earls and barons, while Chapter 22 applied these principles to clergy.[16]

As discussed above, the method by which amercements were, both before and after Magna Carta, actually imposed serves to elucidate both the procedural and substantive content of Chapter 20. The limits of exposure to amercement for any specific wrong were based upon the relative severity of the offence involved. Threepence was a common amercement for petty offences both before and after 1215.[17]

---

[16] At King John's entreaty, Pope Innocent issued a papal bull on August 24, 1215 which "vacated the whole charter as unjust and obtained by compulsion . . . ." W. Blackstone, *The Great Charter and Charter of the Forest* xxv-xxvi (1759). However, in 1216 Henry III, upon ascending the throne at the age of nine, "renewed the great charter which was granted by his father, with such alterations and amendments as the circumstances of the times had made necessary." *Id.*, at xxvii (footnote omitted). After additional reissuances by subsequent Kings, the last occurring in 1300, Magna Carta was subsequently "confirmed, and commanded to be put in execution" by thirty-two separate acts of Parliament. *Id.* at lxxiii-lxxiv.

[17] W. McKechnie, note 4 *supra*, at 286-87 & n.3. Fitzherbert interpreted the language of Chapter 20 as limiting an amercement to the "Value of the Trespass"—no more than the single damages which were awarded to the wronged party. Fitzherbert, *Natura Brevium*, *as quoted* in F. Thompson, *Magna Carta: Its Role in the Making of the English Constitution 1300-1629*, 45 (1948).

Chapter 20 provided that the size of the amercement ultimately imposed might, or perhaps should,[18] be *reduced* below the maximum prescribed amercement based upon the wrong-doer's ability or inability to pay, that determination to be made by a body of the wrong-doer's peers based upon their investigation of the wrong-doer's financial circumstances.[19] Chapter 20 also provided that no amercement could be imposed if to do so would, as in the case of a merchant, result in not "saving his 'merchandise.'" This meant that, in addition to its other safeguards, Chapter 20 "saves to [a merchant] his means of earning a living."[20] A similar guarantee was extended to freemen, whose contenement—"salvo contenemento"—must be saved. And even an amercement, once settled on by these peers, could ultimately be pardoned altogether by the court based upon the "poverty" of the person to be amerced.[21]

C. *The Early Impact of Magna Carta on Excessive Monetary Punishments*

The amercements clauses, unlike many other provisions of Magna Carta which dealt solely with the relationships between the barons and the Crown, were of universal interest and impact among the Crown's subjects. "Very likely there was no clause in Magna Carta more grateful to the mass of the people than that about amercements." F. Mait-

---

[18] According to Fitzherbert, the amercement ultimately affeered was supposed to be less than the maximum possible amercement: "For the Nature of the Word (*Mercy*) is, that a Man shall not be punished so much as he hath deserved." A. Fitzherbert, *Natura Brevium* 169 (f. 76) (6th ed. 1718).

[19] If an amercement was assessed by a judge rather than by the peers of the person amerced, it was subject to being set aside. *See* F. Thompson, note 17 *supra*, at 63 & n.91.

[20] W. McKechnie, note 4 *supra*, at 289. McKechnie observes that "merchandise" might have been understood to refer broadly to a merchant's "position as a merchant" or more narrowly to his "wares." *Id.*

[21] *Id.* at 288.

land, *Pleas of the Crown for the County of Gloucester* xxxiv (1884), *as quoted in* F. Thompson, note 17 *supra*, at 44. The central point of these clauses was to remove, to the maximum extent possible, the *arbitrary* element in the exaction of amercements: "The Crown must conform to its own customary rules."[22]

The history of the actual practice of the English courts under Magna Carta generally, and under the excessive amercements clauses specifically, establishes that the royal courts of England relied on the amercements clauses to invalidate excessive punishments. Magna Carta was frequently relied upon in the English courts by parties in purely private litigation,[23] and judgments contrary to Magna Carta were to be held "for nought."[24] This reliance on Magna Carta was justified based upon the nature of the Charter itself and on enactments of Parliament which directed "that the Great Charter . . . be kept and maintained in all Points." 4 Edw. III, ch. I.

The fullest early exposition of the successful reliance by a private party on Chapter 20 of Magna Carta is to be found in the case of *Le Gras v. Bailiff of Bishop of Winchester*, Y.B. Mich. 10 Edw. II, pl. 4 (C.P. 1316), *reprinted*

---

[22] *Id.* at 287.

[23] *See* F. Thompson, note 17 *supra*, at 33. *See, e.g.*, 55 Selden Society 2, 3 (cas. no. 2); 45 (cas. no. 34); 90 (cas. no. 65); 57 Selden Society 9, 11 (cas. no. 5); 25 (cas. no. 14); 58 (cas. no. 31); 67 (cas. no. 33); 89; 58 Selden Society 19, 20 (cas. no. 8); 21 (cas. no. 9); 69, 73 (cas. no. 42); 88, 90 (cas. no. 54); 112, 114 (cas. no. 65); 147, 148 (cas. no. 79); 211, 218 (cas. no. 106).

[24] W. Dunham, "Magna Carta and British Constitutionalism," in *The Great Charter*, note 3 *supra*, at 25. As Professor Dunham observes, at least from the time (1297) that Edward I declared Magna Carta to be part of the common law, the provisions of Magna Carta were applied by the English courts as statutory law, *id.*, constituting the criteria for determining right law from wrong law and the unjust from the fair. *Id.* at 30.

in 52 Selden Society 3 (1934).[25] In that case, Richard Le Gras had previously brought an action against several private parties which was held by the court to have been improperly pleaded. As a result of this improper plea, the Baliff of the court amerced Le Gras one mark and subsequently seized two horses from Le Gras in satisfaction of the one-mark amercement.

Le Gras then brought a writ of *moderata misericordia*, founded on the amercements clauses,[26] to challenge the amercement by the Baliff. Le Gras's challenge appears to have been procedural—the Baliff had himself assessed the amercement rather than a group of Le Gras's peers, *see* note 21 *supra*, and substantive—the imposition of a one-mark amercement was alleged to be disproportionate to his offence under Chapter 20. As a result of the writ brought by Le Gras, the Baliff was directed to "take a moderate amercement proper to the magnitude and manner of that offence, according to the tenour of the Great Charter of Liberties of England . . . ." 52 Selden Society, at 5 (footnote omitted) (transl. of rec.).

Reported English cases decided subsequently to *Le Gras* amply demonstrate the point, discussed above, that "the amercement should be in proportion to the wrong done" and that "this meant the wrong done to the lord or the

---

[25] In 1225, Magna Carta was again reaffirmed and some changes to the original version were made, including the consolidation of Chapters 20, 21 and 22 into a single chapter renumbered as Chapter 14. Because the original version of Magna Carta was lost for many centuries, *see* F. Thompson, note 17 *supra*, at 6-7, Chapter 14 of the 1225 version was cited by the courts and parties in cases, including *Le Gras*.

[26] The writ *de moderata misericordia* was recognized as having been created by Chapters 20, 21, and 22 of Magna Carta and was generally available to challenge the excessiveness of amercements due to the Crown as well as amercements due to lords. *See* S. Milsom, *Legal Introduction to Novae Narrationes* (E. Shanks ed.), in 80 Selden Society cci-cciii (1963).

court, and not the other party to litigation . . . ."[27] Indeed, the reported cases indicate that it was common practice for a person to be found "in mercy" by a court but to have the actual amercement assessed in an essentially separate proceeding which might occur well after the judgment against him had been entered. For example, in the 13th Century, reports of numerous cases in which jurors were amerced indicate that the assessments of the amercements came at the end of the court's term and that the assessments were imposed by a single group of peers of all of those previously amerced. *See* 96 Selden Society xii (1981).

D. *Magna Carta in England in the 16th-18th Centuries*

By the 16th Century, the role of Magna Carta in the English legal system was well established. Coke's view of the primacy of Magna Carta was clear:

> The highest and most binding laws are the statutes which are established by parliament; and by authority of that highest court it is enacted . . . that if any statute be made contrary to the great charter . . . that shall be holden for none . . . .

E. Coke, *The Second Part of the Institutes of the Laws of England*, Proeme at 7th unnumbered page (1797). By Coke's day, the distinction between amercements and fines which had existed in the 13th century had all but vanished. In the 13th Century, the word "fine" encompassed only "voluntary offerings made to the King to obtain some

---

[27] *See id.*, at cci (footnote omitted) (relying on Fitzherbert, *Natura Brevium* f. 75E). Fitzherbert made this point very strongly, stating that the

> Amercement shall not be unto the Value of the Damages which is done unto the [wronged person], but having Regard unto the Wrong and Offence done unto the Lord for the Wrongs done unto his [wronged person].

A. Fitzherbert, note 18 *supra*, at 168 (f. 75).

favour or to escape punishment." W. McKechnie, note 4 *supra*, at 293. Indeed, even after 1215 this pre-existing practice of imposing such "fines" was a means of evading Magna Carta, because a judge could threaten a defendant with a prison sentence and then exact from that defendant an enormous fine, payment of which would allow the defendant to escape imprisonment. This exaction could occur, unlike the imposition of an amercement, without the interposition of the defendant's peers as required by the amercements clauses. *Id. See also* 2 F. Pollock & F. Maitland, note 8 *supra*, at 517-18.[28]

An amercement, in sharp contrast, was a sum imposed as a punishment which had no "voluntary" element to it. Under the system of amercements—in contrast to the system of fines—justice could not be bought and sold. Over the intervening centuries between 1215 and the early 17th Century, this "option" of buying justice was gradually eliminated and, with that elimination, the word "fine" took on its more modern meaning and the word "amercement" was no longer generally used.[29]

This use of the word fine carried through into the English Bill of Rights of 1689, 1 Wm. & Mary, Sess. 2, Ch. 2 (1689), which provided that "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and

---

[28] "Fines" as that term was understood in the 13th Century are addressed in Chapter 55 of Magna Carta, which provides in pertinent part:

> All fines made . . . unjustly and against the law of the land, and all amercements imposed unjustly and against the law of the land, shall be entirely remitted . . . .

W. McKechnie, note 4 *supra*, at 454.

[29] *Id.* at 293. The late 15th Century furnishes an example of the interchangability of the words amercement and fine where, in an action for debt, a defendant could either be required to "make a grete fyne, [or] in other casys bot to be amersyd." 1 *Borough Customs* (M. Bateson ed.), in 18 Selden Society 206 (1904).

unusuall Punishments inflicted." That document, based upon the Declaration of Rights under which William and Mary, by accepting it, had been permitted jointly to ascend the throne in February of 1689, was "in the tradition of Magna Carta." G. Smith, *A Constitutional and Legal History of England* 367 (1955). In that tradition, the Bill of Rights of 1689 listed the arbitrary acts of the Stuart Kings which had finally brought on the Revolution of 1688, including the imposition of "unduly heavy fines." *Id.* at 368. These documents were, as discussed below, later "to serve as the models for like provisions in the American Bill of Rights." 1 B. Schwartz, *The Bill of Rights: A Documentary History* 41 (1971).

The juridical vitality of the amercements clauses of Magna Carta as reiterated in the English Bill of Rights of 1689 was recognized within three months of enactment of the latter in *Earl of Devon's Case*, 11 State Tr. 1354 (1689). In that case, William Earl of Devonshire had been proceeded against before the King's Bench as a result of his striking a Colonel Culpepper within the environs of the King's Palace. For that act, the Earl was fined 30,000 pounds. *Id.* at 1357. His case was appealed to the House of Lords on several grounds, including the "excessiveness of the fine." *Id.*

In the argument made to the House of Lords on behalf of the Earl, it was contended, *inter alia*, that the fine was disproportionate to the level of fines normally imposed for such an offence: "wherever the law has set down a fine, either by way of punishment or caution, it seldom exceeds 2,000*l*." *Id.* at 1364. The privileges committee of the House of Lords reported the case to the House on April 22, 1689. The House of Lords, after deliberation, concluded, on May 6, 1689, that the fine "was excessive and exorbitant, against Magna Charta, the common right of the subject, and against the law of the land." *Id.* at 1370. Magna Carta, of course, could have been thought applicable if, and only if, the Lords had understood that

the amercements clauses reached "fines" such as the fine imposed against the Earl of Devonshire.

The unbroken continuum anchored by the amercements clauses of Magna Carta and reiterated in the prohibition on "excessive fines" in the English Bill of Rights of 1689 is confirmed by Solicitor General Blackstone in the 18th Century. In Volume 3, of his *Commentaries*, which is devoted to "Private Wrongs," Blackstone identifies six types of private civil actions in which, if the private plaintiff prevailed, the defendant was required to pay a fine to the Crown. 3 W. Blackstone, *Commentaries on the Law of England* *118-19, *138, *179, *188, *398, *402 (1768). Such fines would have been subject to the Excessive Fines Clause of the English Bill of Rights of 1689. *See, e.g., Griesley's Case*, 8 Co. Rep. 38a, 77 Eng. Rep. 530 (C.P. 1588).

E. *The Influence of Magna Carta in the Colonies*

It was to the English Bill of Rights of 1689, "as to Magna Carta, [that] the colonists turned as the documentary evidence of the fundamental rights and liberties of all Englishmen . . . ." Indeed, these "[r]ights and liberties of Englishmen embodied in Magna Carta, the Bill of Rights, and other constitutional documents became vital features of colonial constitutional law . . . ."[30]

The Massachusetts Body of Liberties of 1641 is one of the earliest examples of the direct incorporation into colonial law of the excessive amercements principle of Magna Carta. It is a particularly important example because it establishes that the colonists believed that the excessive

---

[30] H. Hazeltine, "The Influence of Magna Carta on American Constitutional Development," in *Magna Carta Commemoration Essays* 182, 183-184 (H. Malden ed. 1917). Hazeltine traces the basis for the colonists' repeated assertions of entitlement to the rights and liberties of Englishment to the early Royal Charters, such as the first Virginia Charter granted by James I, which specifically asserted that colonists in Virginia were to enjoy those rights. *Id.* at 187.

amercements principle was applicable to fines imposed on a private litigant where the fine was payable directly to the opposing private litigant rather than to the Crown.

In 1635, the Massachusetts General Court decided that "some men should be appointed to frame a body of grounds of laws, in resemblance to a Magna Charta, which . . . should be received for fundamental laws." 1 *Mass. Records* 147, *as quoted in* G. Haskins, *Law and Authority in Early Massachusetts* 36 (1960). The result of this effort was the Massachusetts Body of Liberties of 1641 ("Liberties of 1641"), section 37 of which read, in pertinent part, as follows:

> In all cases where it appeares to the Court that the plantife hath wilingly and witingly done wronge to the defendant in commenceing and prosecuting any action or complaint against him, They shall have power *to impose upon him a proportionable fine to the use of the defendant* . . . .[31]

The Liberties of 1641, however, proved unsatisfactory to a group of freemen of the colony of Massachusetts who, in 1646, petitioned the Governor and General Court for a more complete and specific set of rules. A. Howard, *The Road from Runnymede* 41 (1968). The General Court responded to this petition by issuing a document entitled the Massachusetts "Parallels" in which the General Court sought to alleviate the concerns which had been expressed by demonstrating the relationship between the provisions

---

[31] Massachusetts Body of Liberties of 1641, § 37, *as quoted in* 1 B. Schwartz, *The Bill of Rights: A Documentary History* 76 (1971) (emphasis added). Paralleling the quest for certainty and freedom from arbitrariness which characterized the evolution of the amercements clauses, the General Court had, by 1648, amended section 37 so as to provide that the erring plaintiff "shall pay treble damages to the partie grieved, and be fined fourty shillings to the Common Treasurie." *The Laws and Liberties of Massachusetts* 49 (T. Barnes ed. 1982).

of the Liberties of 1641 and Magna Carta. The "Parallels" read, in pertinent part, as follows:

Magna Charta	Fundamentalls of the Massachusetts
7. No amerciament shall be, but for reasonable cause, and according to the quantity of the offence; saveing to a freeman his freehould, and to a merchant his merchandize; and no such amerciament to be assessed but by the oaths of good and lawful men of the vicenage.	7. Upon unjust suites the plaintiff shall be fined proportionable to his offence. Liberty, 37. No mans goods shall be taken away, but by a due cause of justice. Liberty, 1. In criminal causes it shall be at the liberty of the accused partie, to be tryed by the bench or by a jury. Liberty, 23. We do not fine or sentence any man, but uppon sufficient testimonie upon oath, or confession. Custome.

A. Howard, *supra*, at 404. The Fundamentalls establish that the members of the General Court regarded the amercements clauses of Magna Carta as applicable to fines imposed in civil cases even though the fine was paid to the defendant.

The Pennsylvania Frame of Government of 1682 was equally, if not more, specific as regards the incorporation of the amercements clauses into the fundamental law of Pennsylvania. That document is of particular importance, being regarded as "[i]n many ways, the most influential of the Colonial documents protecting individual rights . . . ." 1 B. Schwartz, *supra*, at 130. William Penn, who in 1687 was responsible for the first publication of Magna

Carta in America, A. Howard, *supra*, at 89, drafted the Frame of Government and brought it with him from England in 1682. *Id.* at 88. The "most important guarantees of the Penn document (at least in their influence on later Bills of Rights) [had] to do with judicial procedure," 1 B. Schwartz, *supra*, at 131. Section XVIII specifically provided that "all fines shall be moderate, and saving men's contenements, merchandize, or wainage." *Id.* at 141. Once again, it is clear from the unqualified language chosen that Penn, as did the General Court of Massachusetts, understood Chapter 20 of Magna Carta to be applicable to fines, whether rendered in civil or criminal cases.

In 1683, the New York General Assembly enacted the New York Charter of Libertyes and Priviledges of 1683, which provided in pertinent part:

> That A ffreeman Shall not be amerced for a small fault, but after the manner of his fault and for a great fault after the Greatnesse thereof Saveing to him his freehold, And a husbandman saveing to him his Wainage and a merchant likewise saveing to him his merchandize And none of the said Amerciaments shall be assessed but by the oath of twelve honest and Lawfull men of the Vicinage provided the faults and misdemeanours be not in Contempt of Courts of Judicature.

1 B. Schwartz, *supra*, at 165.[32]

In 1712, the colonial legislature of South Carolina enacted Magna Carta into law in that colony, while the North

---

[32] As in the Pennsylvania Frame of Government of 1682, *see* 1 B. Schwartz, note 31 *supra*, at 141, the New York Charter of Libertyes provided for bail in a provision separate from the provision dealing with excessive fines, *id.* at 166.

Carolina legislature followed suit in 1715. *See* H. Hazeltine, *supra*, at 196. These actions demonstrate that the colonists were both familiar with the protections provided by Magna Carta and that they desired to implement those protections in the colonies while adapting them to the special circumstances which existed in the colonies.[33]

F. *The Treatment of Excessive Monetary Punishments in Revolutionary Declarations and Constitutions*

At the time of the Declaration of Independence, the English Bill of Rights of 1689 had joined Magna Carta as the second major documentary expression of the rights of Englishmen. Thus, its language respecting excessive fines was incorporated in a number of revolutionary declarations which were issued. For example, the Virginia Declaration of Rights of 1776, authored by George Mason, "repeated from prior documents the right against excessive bail and fines . . . (this time using the very language of the English Bill of Rights that was to become the Eighth Amendment) . . . ." 1 B. Schwartz, *supra*, at 233. The same basic language from the English Bill of Rights of 1689 was also adopted in other colonies. *See id.* at 278 (Delaware Declaration of Rights of 1776, § 16); 282 (Maryland Declaration of Rights of 1776, § XXII); 287 (North Carolina Declaration of Rights of 1776, § X).

The colonists, however, clearly assumed the interchangability of language in Magna Carta and the English Bill of Rights of 1689 where each document addressed the same subject. In Pennsylvania, language more closely associated with Chapter 20 of Magna Carta was utilized to address the problem of excessive fines. Thus, the language

---

[33] The adoption and adaptation of Magna Carta's amercements clauses by the colonists paralleled the somewhat better known adoption and adaptation of Chapter 39 of Magna Carta into what ultimately became the Due Process Clause of the Fifth Amendment. *See* A. Howard, *The Road from Runnymede* 37-38 (1968); H. Hazeltine, note 30 *supra*, at 218-19.

of Section XVIII of the Pennsylvania Frame of Government of 1682, based squarely on Chapter 20 as discussed above, was merely shortened to read, in section 29 of the Pennsylvania Declaration of Rights of 1776, "all fines shall be moderate." 1 B. Schwartz, *supra*, at 272. As observed by Professor Howard, *see* A. Howard, *supra*, at 213, the concept of proportionality in the Eighth Amendment arises directly out of Chapter 20 of Magna Carta, and only indirectly out of the language of the English Bill of Rights dealing with cruel and unusual punishments. This observation is confirmed by this Court's decision in *Solem v. Helm*, 463 U.S. at 285, in which it is stated that the principle of proportionality in Magna Carta's amercements clauses was "repeated" in the English Bill of Rights of 1689.[34]

G. *George Mason's Objections to the Federal Constitution*

George Mason, the author of Virginia's Declaration of Rights, 1776, objected to the proposed Federal Constitution in part because there was not, as Mason observed, a "declaration of rights . . . ." 1 B. Schwartz, *supra*, at 444. Mason went on to argue that in the absence of a federal declaration of rights, "the people [are not] secured even in the enjoyment of the benefit of the common law . . . ." *Id.*, at 444-45. (Magna Carta had been declared to be part of England's common law in 1297 by statute, 25 Edw. I,

---

[34] The dissent in *Solem v. Helm* took the view that the Cruel and Unusual Punishments Clause of the Eighth Amendment did not incorporate Magna Carta's principle of proportionality but, rather, was directed only to eliminating the various kinds of torture imposed in the reign of the Stuart Kings. 463 U.S. at 312 (Burger, C.J., dissenting). Even if that view had prevailed in *Solem*, the concept of proportionality is necessarily inherent in the notion of an "excessive fine," leaving no doubt that at the very least Magna Carta's principle of proportionality was incorporated into that part of the English Bill of Rights which addresses excessive fines.

ch. I, 1 Stat. at Large 131-32.) The proponents of the proposed constitution responded:

> The principles of the common law, as they now apply, must surely always hereafter apply, except in those particulars in which express authority is given by this constitution . . . .

Id. at 450. Mason was not persuaded and thereafter he

> led the attack on the [proposed] Constitution, drawing on the historical example of the English documents, such as Magna Carta and the Bill of Rights, which served to secure the liberties of Englishmen.

A. Howard, supra, at 222-23.[35] In the state ratifying conventions, however, the proponents initially prevailed, largely on the argument that because the proposed Constitution, unlike any comparable English document, was designed as a limit on governmental power, individual rights were not be be assumed to have been relinquished. *See id.* at 230-31.

Mason's views, shared by many others, ultimately prevailed when the Bill of Rights became, only four years later, "the bridge between Magna Carta in England and the Charter's legacy in America. *Id.* at 239-40. The Excessive Fines Clause of Eighth Amendment, lifted verbatim from the Virginia Declaration of Rights of 1776 and the English Bill of Rights of 1689, brought with it centuries of history which convincingly demonstrates its applicability to monetary fines imposed for the proposes of punishment and deterrence.

---

[35] As Professor Howard observes, Magna Carta was largely irrelevant to the unamended Constitution because Magna Carta was not "in the main concerned with the distribution of governmental powers . . . ." A. Howard, note 33 *supra*, at 220.

CONCLUSION

The *ad hoc* system under which Mississippi (and other States) metes out punishment in the form of punitive fines imposed by civil juries pursues the same governmental objectives as the system under which wites, amercements and fines have been imposed in England for a millennium. However, the courts of this country have failed to recognize that the common law system which authorizes the imposition of punitive fines simultaneously restricts the amount of those fines and that the Eighth Amendment at the very least incorporated the controls in Magna Carta and the English Bill of Rights that evolved in England between 1215 and 1791. It is therefore necessary for this Court to announce that the Eighth Amendment requires the restoration of coherence and balance to a penal system which has become distorted by permitting punishments without applying the controls which limit those punishments.

May 29, 1987

Respectfully submitted,

Of Counsel:

DARRELL S. RICHEY
VICE PRESIDENT AND GENERAL COUNSEL
GOLDEN RULE INSURANCE COMPANY
712 11th Street
Lawrenceville, Ill. 62439

THOMAS J. NORMAN
ALLSTATE INSURANCE COMPANY
4 Allstate Plaza
Northbrook, Illinois 60062

COLIN MCRAE
SENIOR VICE PRESIDENT AND GENERAL COUNSEL
TRANSAMERICA INSURANCE COMPANY
1150 South Olive Street
Los Angeles, California 90015

*GEORGE C. MONTGOMERY
MONTGOMERY, GASCOU, GEMMILL & THORTON
1100 Glendon Avenue, Suite 1800
Los Angeles, California 90024
(213) 879-9115

**Counsel of Record for* Amici Curiae

Of Counsel:

N. DOUGLAS MARTIN, JR.
ASSISTANT VICE PRESIDENT & COUNSEL
FIREMAN'S FUND INSURANCE COMPANY
777 San Marin Drive
Novato, California 94998